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89-2012

No. _____

Supreme Court, U.S.
FILED
MAY 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1989

WILLIE ANDRE SMITH, JR.,

Respondent,

-vs-

UNITED STATES OF AMERICA,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY F. LEONARDO, JR., ESQ.
Counsel of Record for Respondent
Suite 500, Irving Place
30 West Broad Street
Rochester, New York 14614
Tel. (716) 454-7442

QUESTION PRESENTED FOR REVIEW

WHETHER AN ATTORNEY MAY BE COMPELLED TO TESTIFY AT TRIAL ABOUT THE EXISTENCE AND SUBJECT MATTER OF MEETINGS AMONG THAT ATTORNEY AND ALLEGED CO-CONSPIRATORS WHERE THE ATTORNEY'S TESTIMONY IS OFFERED TO PROVE THE EXISTENCE OF A CONSPIRACY AMONG THAT ATTORNEY'S CLIENT AND THE ATTENDEES OF THE MEETINGS?

THE QUESTION FOCUSES UPON WHETHER AN ATTORNEY OR CLIENT RELATED PRIVILEGE SHOULD EXTEND TO THE EXISTENCE AND SUBJECT MATTER OF MEETINGS HELD BY AN ATTORNEY (IN CONNECTION WITH THE REPRESENTATION OF HIS CLIENT) WITH PERSONS WHO MAY BE INVOLVED IN THE SAME CRIMINAL ENDEAVOR AS IS THE CLIENT.

PUT SIMPLY, SHOULD AN ATTORNEY'S ABILITY TO MEET FREELY WITH ANYONE HAVING KNOWLEDGE ABOUT A CASE IN PREPARATION BE PROTECTED BY SOME FORM OF PRIVILEGE?

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MANDATE AND JUDGMENT BELOW

A mandate of the United States Court of Appeals for the Second Circuit was issued March 8, 1990, filed in the Office of the Clerk of the United States District Court, Western District of New York (CR-88-111L) on March 12, 1990, and made a Judgment of the District Court on March 14, 1990. A copy of the Second Circuit's Mandate is included in the Appendix at page 2.

JURISDICTION

The judgment sought to be reviewed is dated March 14, 1990, and was filed March 14, 1990, in the United States District Court, Western District of New York. Review is authorized under 28 USC 1254 (1).

CONSTITUTIONAL DIMENSION

The issues here involves the extent of an attorney-client and/or attorney-work-product privilege. These privileges are grounded in the Fifth (protection against self-incrimination) and Sixth (entitlement to effective assistance of counsel) Amendments to the United States Constitution.

STATEMENT OF THE CASE

It is well-settled that an attorney may not claim that the source of his attorney's fees in a particular case is protected by privilege, even where the by-product of revealing a fee source is the demonstration of a "suspicious" connection between the fee payer and the attorney's client. The boundaries of this "fee source" rule were stretched (at trial below) to the point where an attorney was compelled to reveal the subject matter of private meetings concerning a case in preparation and the names of the attendees. A dangerous precedent has thus been set which will severely hamper an attorney's ability to prepare a case through meetings with persons who have first-hand knowledge of the facts.

The petitioner, Willie Smith, was charged with Conspiracy to Distribute

Cocaine. The chief witness against him was an alleged co-conspirator named Sammie Sermons. Sammie Sermons had been previously tried and convicted of cocaine-related charges which involved the same underlying acts as did the charges against the Petitioner (Smith).

Sammie Sermons, at his own trial, was represented by an attorney named Barry Witlin. The prosecutor in the Smith trial wished to call Barry Witlin to testify about the source of his attorney's fees for the Sermons trial. In theory, Witlin was to name Willie Smith as that source. In lieu of Witlin's testimony a Stipulation was drawn up. The Stipulation read as follows:

> That his [Barry Witlin's] fees for this representation totalled approximately $30,000.00, and were paid by either Willie Smith or Jose Amador. While he has not specific recollection of the number of times payments were made, he generally recalled that all payments were made in Miami, and that on at least

> one occasion, and perhaps another, payments of currency were made in the presence of Mr. Smith and Mr. Amador. He has no specific recollection whether Mr. Smith or Mr. Amador actually tendered the payment or payments, but both gentlemen were present when the payments were made on Mr. Sermon's behalf. (T. 197-198)

The Stipulation, then, did not reveal the source of Witlin's fees. Again, the stated purpose of this testimony was to connect Willie Smith to Sammie Sermons by proof that Smith paid the fee. But the best Witlin could do was say that either Smith or Amador paid his fees.

The Stipulation failed to adequately address the only issue for which it could be allowed in evidence under the narrow exception to the privilege rules. It's probative value on the question of the identity of the fee payer was nil.

But the Stipulation did reveal a lot of information that corroborated Sermons' testimony about a conspiracy among himself, Willie Smith and Jose Amador.

It revealed that several meetings took place among his attorney (Witlin), Smith and Amador. It revealed that those meetings concerned Sermons' case.

In other words, the narrow exception to attorney or client privilege which has developed in the area of fee sources was stretched to the point of abuse here. Under the guise of fee source identification, the existence and subject matter of private meetings with an attorney were revealed. These meetings concerned a case in preparation.

The Stipulation was allowed in evidence because, in the eyes of the trial judge, (1) it did not reveal privileged information and (2) Willie Smith did not demonstrate an attorney-client relationship between Witlin and himself. (T.pp. 190, 191, App. pp. 28, 29, 30, and 31)

Witlin claimed that an attorney-client

relationship existed among himself, Jose Amador and Willie Smith at the time of the meetings. In fact Witlin was representing Amador in a criminal matter at the time of the Smith trial. (T. pp. 177-184, App. pp. 8-20). Smith testified about his client-relationship with Witlin (after the Stipulation came in evidence). Even the Government introduced evidence demonstrating the attorney-client relationship between Witlin and Smith (Witlin's business cards found in Smith's home were put in evidence by the Government). Obviously, the existence of the relationship helped the Government's conspiracy case. In spite of the fact that the evidence of the attorney-client relationship was never challenged by the Government (and indeed was in part proved by the Government) the trial judge found that Willie Smith had not demonstrated it sufficiently. The Second Circuit upheld

that finding. (App. p.4,5)

The appeal sought here concerns the first prong of the trial judge's rationale for admitting the Stipulation in evidence - i.e. that it did not reveal privileged information.

It was argued before the Second Circuit that the meetings were protected by a type of "attorney-work-product" privilege. The essence of the argument is that an attorney must be allowed to meet with anyone who may help in the preparation of a case without the fear of being compelled to implicate those who attend such a meeting in the very criminal activity that the meeting concerned.

The Second Circuit brushed aside this argument by stating that it was not raised below. (App. p.4,5) Although the words "work-product" were not used at trial, the objection to the Stipulation

on the basis that it revealed the existence and topic of group meetings among alleged co-conspirators and an attorney was made quite forcefully.

> MR. ROTHENBERG [Witlin's attorney]: Correct. It is our position, I believe as well as Mr. LaDuca's position, that the fact of the meeting and the fact of a consultation was in itself a confidential act. So that the disclosure of the meeting and the disclosure of any consultation with respect to this conspiracy is, in fact, a breach of confidentiality. (T. pp. 177-178, App. pp.9)

In addition, In re Shargel, 742 F2d 61 (2nd Circuit 1984) was cited to the Court and a passage which indicated that such "group meetings" are protected by privilege was read into the record.

The "group meeting" issue was, then, squarely before the trial judge (raised by the attorney who held the meetings.) The fact that it was raised in the context of "attorney-client" as opposed to "attorney-work-product" privilege shouldn't preclude review. At the very

least, the Second Circuit could have reviewed it under the "Plain Error" exception to Evidence Rule 103. The attorney who held the meetings clearly objected on the basis that their existence and topic were confidential.

The basis of Federal jurisdiction below was a Superseding Indictment (No. 88-111L) which charged the Petitioner with Violations of 21 USC Sections 846, 843 (b) and 841 (a) (1).

ARGUMENT

The Second Circuit's Mandate here (App. p.1) appears to conflict with authority in the Second Circuit (and other circuits as well) regarding the confidentiality of meetings held by an attorney during case preparation with persons other than the attorney's client.

The trial judge asked for authority which would support the contention that the "group meeting" information was protected by privilege. In re Shargel, 742 F2d 61 (2nd Cir. 1984) was cited and the relevant passages from that case were specifically identified or read into the record. (T. p. 178, App. p.10) It appears that Shargel is the strongest recent reference to this problem in the Second Circuit. (Ironically the case was cited by the trial judge in support of his ruling on the admissibility of the affidavit.) (T. 181) The relevant

portion states:

> We note, however, that an inference of confidential communications indicating concerted activity among several clients might be drawn from a group consultation with an attorney. We were informed at oral argument that only individual consultations with Mr. Shargel occurred. In any event, if the documents in question suggest that a group meeting took place or otherwise contain information protected by the privilege, they may be submitted in camera to the district court for appropriate redaction. at. p. 64

The clear implication of this language is that the existence of a meeting among alleged co-conspirators and an attorney is privileged. The language gives the impression that the privileged nature of such information is obvious and beyond argument.

Discussion in the case law of the theoretical underpinnings of this area of privilege is hard to find. What discussion there is usually comes in the form of a passing mention (as in Shargel). For example, in Matter of

Witnesses before Sp. March 1980 Gr. Jury, 729 F2d 489 (7th Cir. 1984) the following brief mention of a similar (but by no means identical) problem is made in a discussion about when a client's identity or fees should be protected by privilege: "[T]he Fifth and Ninth Circuits were prepared to recognize the privilege only where disclosure of the client's identity or fees would have revealed a confidential disclosure, such as the client's involvement in the past criminal conspiracy." at p. 494. The point here, however, is that no pertinent discussion of privilege as it applies to group meetings among an attorney and persons alleged to be co-conspirators was found. Because of the lack of relevant theoretical discussion, argument here will deal with the relevant general principles behind the concept of privilege and will necessarily refer to

authority which discusses these general principles (as opposed authority which is factually similar).

In re Terkeltaub, 256 F. Supp. 683 (S.D.N.Y. 1966), dealt directly with whether the existence of a meeting with an attorney was privileged. Here the lawyer's client was charged with perjury. The witness who was to provide the Government's proof of perjury was invited by the lawyer to a meeting at a restaurant. The lawyer, his client and the witness attended the meeting.

The Government wanted the witness to testify about this meeting (presumably to explore whether the witness was "tampered with"). The attorney-client privilege was not available because the presence of the witness at the meeting constituted a waiver of the client's right to secrecy which usually attaches to a conversation between a lawyer and

his client.

In spite of the waiver, the court held that everything about the meeting, including its existence, was privileged. It based its holding on the attorney's need for confidentiality for purposes of trial preparation.

> At the heart of the job of "thorough-going investigtion and preparation" is the interviewing of prospective witnesses, hostile as well as friendly. And no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings.
>
> * * *
>
> Because privacy is so vital to these preparatory efforts, the prosecution is forbidden to eavesdrop or plant agents to hear the councils of the defense.
>
> * * *
>
> The defendant has a right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation. The prosecution's secret intrusion offends both the Fifth and Sixth Amendments. Caldwell v. United States, 92 U.S. App D.C. 355, 205 F2d 879 (1953), cert. denied 349

U.S. 930, 75 S.Ct. 773 (1955).

* * *

> The ultimate interest to be protected is the privacy and confidentiality of the lawyer's work in preparing the case. It is the violation of that interest that is held offensive to the Constitution in the cases of eavesdropping and spying. The protection would be a thin illusion if the Government could have for the asking what it has, in rare lapses, sought by less genteel means.

* * *

> ...[M]ay the defense lawyer preparing for trial be compelled to report under oath the existence, time, place, and content of an interview with the witness? Without holding that there could never be an affirmative answer to this question, our conclusion is that it should be answered in the negative on the facts now before us. Terkeltaub, supra, at. pp. 685-686.

Terkeltaub was cited with approval in a "Watergate"-related case, United States v. Mitchell, 372 F. Supp. 1239, where testimony by the lawyer for Maurice Stans about meetings he had with Robert Vesco was suppressed. Presumably the

existence of the meetings was suppressed as a consequence.

This kind of privilege then simply allows an attorney to do his or her job. It doesn't take much imagination to predict what would happen without the "trial-preparation-meeting" privilege. Attorneys routinely meet with as many involved parties as possible in preparing a case, often in a group. If such meetings were not protected by privilege attorneys would be ethically obligated to inform anyone who is asked to attend of the possibility he or she may be forced to provide evidence against the attendee in a future conspiracy proceeding. Meetings with potential witnesses and other persons who are involved in a case would simply not take place under those conditions. An attorney's ability to prepare a case thoroughly would obviously be severely hampered without a

"preparation" privilege which extends to the very existence of meetings with involved persons.

. To repeat the words of the Terkeltaub court: "The defendant has a right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation..."..."[May] the defense lawyer preparing for trial be compelled to report under oath the existence, time, place, and content of an interview...? ...[O]ur conclusion is that [this question] should be answered in the negative..." Terketltaub, supra at. p. 686.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

CR-88-111L

-vs-

WILLIE ANDRE SMITH, JR.,

Defendant.

A certified copy of the Mandate of the United States Court of Appeals for the Second Circuit issued March 8, 1990 having been filed in the Office of the Clerk of this Court on March 12, 1990 it is hereby

ORDERED, ADJUDGED AND DECREED that said Mandate be, and hereby is, made the judgment of this Court.

/s/ David G. Larimer

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 14, 1990

TO: Bradley Tyler, AUSA
Anthony F. Leonardo, Jr., Esq.

App1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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88 cr 111
LARIMER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and ninety.

Present:

Hon. James L. Oakes,
Chief Judge.
Hon. George C. Pratt,
Circuit Judge.
Hon. Leonard B. Sand,
District Judge.*

United States of America,
Appellee,

v. 89-1330

Willie Andre Smith, Jr.,
Appellant.

O R D E R

Willie Andre Smith, Jr., appeals a June 28, 1989, judgment of conviction entered in the United States District Court for the Western District of New York, David G. Larimer, Judge. Smith was convicted on two counts of conspiracy to distribute and possess with intent to distribute cocaine, 21 U.S.C.A Section

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846 (West Supp. 1989), six counts of distribution of cocaine and heroin, 21 U.S.C. Section 841(a) (1) (1982), and twelve counts of use of a communication facility in the commission of a controlled substance felony, 21 U.S.C. Section 842 (b) (1982). We affirm.

Smith first challenges, as a violation of the attorney-client privilege, the admission of the stipulated testimony of Barry Witlin, the attorney for alleged co-conspirator Sammie Sermons, which stated that Smith and another person had paid Sermons' legal fees. To assert the attorney-client privilege, a party first must establish the existence of an attorney-client relationship between himself and the attorney whose testimony is sought.

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*Of the United States District Court for the Southern District of New York, sitting by designation.

See, e.g., United States v. Demauro, 581 F.2d 50, 55, (2d Cir. 1978); United States v. Stern, 511 F.2d 1364, 1367 (2d Cir.), cert. denied, 423 U.S. 829 (1975). Smith's trial counsel presented no evidence, other than his own conclusory representations, to demonstrate that Witlin was acting as Smith's attorney at the time Smith was alleged to have advanced Sermons' legal fees to Witlin. Although the district court repeatedly informed Smith's counsel that these representations were insufficient to establish an attorney-client relationship, Smith made no additional showing to establish the attorney-client relationship. We agree with the district court that Smith did not establish this relationship and accordingly reject his attorney-client privilege claim.

Smith next argues that even if the contested communications were not within

the attorney-client privilege, they would fall within a criminal attorney's work-product privilege. See In re Terkeltoub, 256 F.Supp. 683 (S.D.N.Y 1966). Because Smith did not raise this contention before the district court, we do not review it on appeal. See Fed. R. Evid. 103(a) (1).

Finally, Smith asserts that the district court erred in refusing to serve under Rule 14 of the Federal Rules of Criminal Procedure the conspiracy alleged in count one of the superseding indictment from the remaining twenty counts under the superseding indictment. To overturn a conviction based upon a district court's refusal to grant a Rule 14 motion, a defendant must demonstrate substantial prejudice from the joint trial. See United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980). Because we believe that the jury was able to

differentiate between the evidence relevant to count one and the evidence relevant to the remaining counts, we do not believe Smith was substantially prejudiced by the district court's refusal to sever.

Count one and the remaining counts involved separate and distinct incidents. The evidence presented at trial easily divided itself between that relevant to count one and that relevant to the remaining counts. For count one, the Government relied solely upon the testimony of Sammie Sermons, and Sermons' testimony did not spill over into any of the other counts remaining under the indictment. Likewise, government witnesses other than Sermons limited their testimony to the remaining twenty counts and did not address incidents relevant to count one. Finally, the district court instructed the jury on a

number of occasions that it was to deliberate upon each count separately. Consequently, we reject Smith's argument that the district court committed error in declining to sever.

Judgment affirmed.

/s/ James L. Oakes
James L. Oakes,
Chief Judge.

/s/ George C. Pratt
George C. Pratt,
Circuit Judge.

/s/ Leonard B. Sand
Leonard B. Sand,
District Judge.

MR. LaDUCA: Fine, I would even have no problem with that, but I do have a problem in the government saying, "Who paid you," because the identity of the people who paid him who were clients, not benefactors, discloses the privileged communication.

THE COURT: No, I disagree. You made your point. Mr. Rothenberg, do you have anything to add or subtract to it?

MR. ROTHENBERG: Yes, your Honor, it your Honor please, I will be very brief.

Our firm represents Barry Witlin who is the subpoenaed witness in this case. I am not going to repeat what Mr. LaDuca has said, but first of all, with respect to Mr. Smith, it is Mr. Witlin's intention to raise the attorney/client privilege and to decline to testify under

the circumstances.

I want to only say two very quick things with respect to that. First of all, your Honor has indicated that your Honor's ruling, on the basis that the proposed stipulation contains no confidential communications in the form of verbal statements made by Mr. Smith to Mr. Witlin --

THE COURT: Or Mr. Witlin to Mr. Smith.

MR. ROTHENBERG: Correct. It is our position, I believe as well as Mr. LaDuca's position, that the fact of the meeting and the fact of a consultation was in itself a confidential act. So that the disclosure of the meeting and the disclosure of any consultation with respect to this conspiracy is, in fact, a breach of confidentiality.

THE COURT: Do you have any

authority for that?

MR. ROTHENBERG: I would cite the Court to footnote six of the Shargell opinion, which again draws a distinction from -- between Shargell, where there was no inference of conspiracy as a result of consultation, and this case, where the inference is conspiratorial, based merely on the consultation or the payment. That's with respect to Mr. Smith.

Secondly, with respect to Mr. Amador, this is a separate issue, but as I understand it, the stipulation intends to name Mr. Amador separately. I am, on behalf Mr. Witlin, I am advising the Court that Mr. Witlin is currently representing Mr. Amador and that it is Mr. Witlin's position once again that the disclosure of Mr. Amador's name violates the attorney/client privilege.

Furthermore, I am advised that

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Mr. Amador specifically told Mr. Witlin with respect to this issue that he does not waive the privilege and that Mr. Witlin has specifically been authorized with respect to Mr. Amador, in addition to Mr. Smith, that he is to raise the attorney/client privilege, and would like to more or less point out the obvious. Mr. Amador is not on trial here, and although I am not familiar with the proof in this case, it seems to me that there is perhaps much less need for that disclosure in this case.

Third, it's our position, Mr. Witlin's position, that the determination of privilege in this case is not a matter of Second Circuit law but is a matter of Florida law, and the reasons being that the contacts that are the subject of the proposed testimony are Florida contacts and that all the activity of Mr. Witlin

obviously was in Florida. There's nothing that happened within New York or the Second Circuit, other than this trial.

Now, I am told that the Florida -- I want to cite this correctly to the Court. The Florida Bar rules regulating the conduct of Florida attorneys, and I perhaps do not have the -- I believe the official title is, "Rules regulating the Florida Bar" -- that they specifically prohibit disclosure of this information in the absence of a Court order.

Now, that may be just begging the question in this case, but moving from the substance of the argument to the procedure of the argument, if it is the Court's ruling after reviewing all applicable authority that this is not privileged material in the context of this case, Mr. Witlin would respectfully

request that consistent with the Florida rules, the Court issue an order with respect to Mr. Witlin's testimony.

Now, I understand that the parties have agreed as to the use of a stipulation and the contents of a stipulation, and so as a practical matter, we are not going to have Mr. Witlin in the courtroom, but I do think that it's important that if the Court is going to rule that the stipulation is admissible, that the Court direct for whatever reasons of substantive law apply, that the Court direct that Mr. Witlin's testimony on this issue be heard and that the testimony is not governed by the privilege.

Again, if we had Mr. Witlin in the courtroom, he would assert the privilege. He wouldn't do anything until your Honor ruled one way or another.

He's not here, and I am -- I wasn't going to be here throughout the trial either, so it's my specific request that the Court rule on the record and direct Mr. Witlin to testify before any stipulation is entered, before any stipulation is offered, even it the parties are in agreement as to what the stipulation should say.

THE COURT: Say that last part again.

MR. ROTHENBERG: What I was pointing out was, your Honor, if Mr. Witlin were here --

THE COURT: Right.

MR. ROTHENBERG: -- he would assert the privilege in person and decline to answer any questions until your Honor ordered him directly, made him answer.

Now, he's not going to be here,

and I wasn't really planning to be here the whole trial. There is a stipulation, and even if the parties have agreed as to the contents of the stipulation, consistent with the Florida rule that I just cited to the Court, I would ask that Mr. Witlin be ordered specifically to testify before any stipulation be accepted into evidence.

THE COURT: I will do that. Mr. Tyler, do you want to be heard? Let me just, in anticipation of what you are going to say, but it just seems to me that all this is is the payment of someone else's legal fee by Mr. Smith.

MR. TYLER: Correct.

THE COURT: Nothing more, nothing less, and I think that's precisely what Colton, Pape and Shargell talk about and decline to extend the privilege to that kind of transaction, not testimonial

transaction, and that's where I am coming from. Mr. Tyler, do you have anything else?

MR. TYLER: On the question of choice of law, Judge, without a cite to a specific case, I believe that the Eleventh Circuit, because of its geographic jurisdiction, has even more pointed language in this regard in this conspiratorial situation concerning traffickers paying for the legal fees of people caught and prosecuted.

THE COURT: The only thing, Mr. LaDuca, I guess I have spent more time on this than I intended, but it's important, and we will take whatever time is necessary -- just to complete the record, do you want to make a proffer or put Mr. Smith on the stand concerning the existence or not of an attorney/client relationship?

I will let you have a go of it, but even if you prove that there was an attorney/client relationship, I still don't think that what we have here is anything more than a payment by Smith to Witlin of fees to provide legal representation for Sermons.

MR. LaDUCA: Your Honor, may I have a moment?

MR. ROTHENBERG: Your Honor, with respect to the record on this application, Mr. LaDuca pointed out to me that there may have been one factor that I didn't specifically indicate, which he had indicated in his argument, and that is that prior to the time of the meeting, not only did Mr. Witlin know Mr. Smith, but Mr. Witlin had rendered legal services to Mr. Smith, and in fact there had been an attorney/client relationship.

THE COURT: Previously on some

other matters?

MR. ROTHENBERG: That is correct. That is correct, but there was -- there were prior existing -- there was a prior existing attorney/client relationship between the two, to my understanding.

THE COURT: All right. And that information you got from Mr. LaDuca here now, I guess.

MR. ROTHENBERG: Pardon me?

THE COURT: That information you learned from Mr. LaDuca?

MR. ROTHENBERG: No, no, no I believe -- no, what I tried to say to the Court was that Mr. LaDuca pointed out to me that I had not made mention of that, and I do want to indicate as much. It is my understanding that that was the case independent of what Mr. LaDuca has represented on behalf of Mr. Smith.

THE COURT: I don't see how that

changes anything. The fact he had an attorney before doesn't give you kind of lifelong attorney/client protection here. Just because he had him on a prior occasion doesn't mean that ever after anything that's done, there's a shield that comes around him under the guise of attorney/client privilege.

I understand your point. Mr. LaDuca, anything you want to submit to me to seek to establish that at the time of this alleged meeting between Mr. Smith and Mr. Witlin, that there was, in fact, an attorney/client relationship?

MR LaDUCA: Your Honor, I am troubled as to how I can do that without waiving the privilege.

THE COURT: Pretty easy, put him on the stand. You ask him why he was there, what he was doing, why he paid the money, is there some legal proceeding

pending against him. I don't know what legal proceeding was pending concerning Mr. Smith that would cause him to seek the advice of an attorney if Smith hadn't been arrested.

MR. LaDUCA: I don't think there has to be a legal proceeding pending against you in order for you to feel that you are in need of advice of counsel and being willing to pay for the same. I think many people consult attorneys before the do things or before things are -- before they have lawsuit.

And a matter of a criminal nature, certainly many people may consult an attorney regarding their rights and their obligations, so to speak, without actually having a criminal charge placed against them.

THE COURT: I understand that. If that's what Mr. Smith was there doing,

then I guess I would like to hear that. I don't know how I can find there was an attorney/client relationship without --

MR. LaDUCA: Well, I am afraid once Mr. Smith says that, then is there going to be questioning if there was conversation, what that conversation was, which would then require him to reveal his attorney/client relationship.

THE COURT: So far all I have in a stipulation from an attorney which doesn't indicate to me one at all, that Mr. Smith had any kind of attorney/client relationship with Mr. Witlin. If you are content to leave it that way, then I will rule.

MR. LaDUCA: I would then, at the Court's request --

THE COURT: It's not my request. You do whatever you want. It's your application that the attorney/client

privilege bars this testimony, and if you think you have adduced sufficient facts to support the existence of the attorney/client relationship and the existence of a confidential communication, then I will have to render a decision.

MR. LaDUCA: I would have one other question. Assuming that I were inclined to put Mr. Smith on the stand to indicate that there was, in fact, a meeting between himself and Mr. Witlin and conversation took place relating to areas other than the fee, the payment of the fee, would the Court be inclined to let the People use the statement against Mr. Smith in his testimony in this case?

THE COURT: I don't think it would be proper in the government's direct case. I don't know if the government intends to -- would seek to

use it.

MR. LaDUCA: Well, it would be important to me whether it be in direct -- obviously my question would be I guess it should cover both direct and cross-examination.

MR. TYLER: I would oppose that as far as cross-examination. I would clearly use it in cross-examination. Direct case I think there is a question, and the question as I see it is this a suppression hearing, and would it follow those rules of protection for a witness who takes the stand, and I am not sure about that.

THE COURT: I am not either. I think it would. It would be like a Simmons inquiry.

MR. TYLER: Simmons proceeding, but as far a cross-examination, it is fair game. That's my position.

MR. LaDUCA: Well, it's only fair game if there is inconsistent statements on the stand.

THE COURT: Right. That's right. If your client testifies now that he did A, B and C and then during the trial gets up and testifies entirely differently --

MR. LaDUCA: That's correct.

THE COURT: -- the I think it's fair cross-examination.

MR. LaDUCA: Well, my question is whether or not there will be cross-examination, period on that area, not inconsistent statements.

THE COURT: The government is not going to be allowed to use it in their direct case. If your client testifies and testifies about the matter and testifies inconsistently, I think, unless I am shown some authority to the

contrary, the government can use it.

If he doesn't testify about it, then it seems to me to be beyond the scope of direct and not subject to cross-examination.

As I say, I don't mean to put your client in a difficult position, but even if your client gets up and testifies that yes, he was there to consult Mr. Witlin for legal advice, I am not sure that's going to change my ruling here, because I don't think what the government seeks to do here violates the privilege. It merely seeks to prove payment of fees on behalf of someone else, which I don't think is covered by the privilege.

MR. LaDUCA: Let me ask this question that may solve the problem. Does the Court doubt that Mr. Smith and Mr. Amador appeared in Mr. Witlin's office for a purpose beyond the payment

of the fee?

THE COURT: Do I doubt that? Yes.

MR. LaDUCA: So that your position is now the only reason they were there was to just hand a fee to Mr. Witlin and not discuss with him in any way the facts surrounding the case that he was representing Mr. Sermons on?

THE COURT: Well, do I have doubts about it? Yes, I have doubts about it, because I don't know that. If all they are there for is to discuss the case involving Sermons, I am not sure -- I don't see where that's a confidential communication either. If two people go in to discuss a case involving a third person, to me that's not necessarily any kind of a confidential communication with a lawyer.

MR. LaDUCA: Obviously there's

little they could discuss about Sermons' arrest, because neither were present when that happened.

THE COURT: Well, to me, I don't want to be accused of being simplistic, but it just seems to me that what we are about here doesn't have anything to do with communications, even if Smith and Amador when to Mr. Witlin for two purposes: One, to get some legal advice from him, which is legitimate, and two, to pay thirty thousand dollars for Mr. Sermons' fees.

I don't think that's going to change my ruling concerning the government's attempt to introduce through this stipulation proof of that latter event, that is the payment of fees on behalf of Mr. Sermons.

If the government is also going to try to introduce conversations Witlin

had with Smith and Amador, that's a different thing. I would not, based on what I know now, probably allow that. They are not seeking to do that.

That's where I see the case. If you want to put your client on the stand and further develop the record, but in fairness to you, even if he gets up and says, "I went to talk to Barry Witlin about some legal matters --"

MR. LaDUCA: Not some legal matter, obviously the matter.

THE COURT: Doesn't matter what legal matter. If he went to talk to him --

MR. LaDUCA: The matter which the government is contending is the issue in the trial before your Honor.

THE COURT: So you decide what you want to do in terms of --

MR. LaDUCA: Well, based on your

Honor's statements, I would, I believe at this time, decline to offer my client's testimony at this time in that matter.

THE COURT: All right. Does the government feel sanguine about that?

MR. TYLER: I have nothing further.

THE COURT: Well, as I have said throughout the last hour here, based on this proposed stipulation, which I assume is going to be marked at some point.

MR. TYLER: Exhibit 11.

THE COURT: Exhibit 11, based on my reading of the cases that I have cited and having been shown no authority to the contrary, it seems to me that what the government seeks here is merely testimony about the fact that Smith and a Mr. Amador, Jose Amador, arranged for the payment of fees on behalf of Mr. Sermons, and keeping in line with the cases that

I cited, that the privilege should be narrowly drawn here.

It has not been demonstrated to me that there was a confidential communication, attorney/client relationship between Mr. Smith and Mr. Witlin. But frankly, even if there were an attorney/client relationship about some legal matter, that would not change my ruling, since I don't think the government is seeking to obtain any kind of confidential communication, merely as the Second Circuit said in the Shargell case, at page 64-65, and I am summarizing, but it denies the attorney/client protection concerning evidence indicating payment of one person's legal fees by another.

The Second Circuit for years has so held, at least since Colton and Pape, which were decided -- Page was decided in

1944.

So based on that, I will overrule Mr. LaDuca's objection to this testimony. I will also overrule Mr. Rothenberg's objection or his assertion of the privilege on behalf of his absent client. I will direct that Mr. Witlin testify, at least to the extent of the facts set forth in this stipulation.

That being the case, it's my understanding, since you have preserved your legal issue, Mr. LaDuca, you have no objection to the stipulation?

MR. LaDUCA: That's correct, your Honor.

MR. ROTHENBERG: Your Honor, on behalf of Mr. Witlin, I would only ask that a photocopy of the stipulation be provided to me by the clerk of the Court at some time. I don't want to inconvenience the Court.

THE COURT: Well, I suspect Mr. LaDuca or Mr. Tyler can provide that to you. I will give you this

CERTIFICATE OF SERVICE

RE: Petition for Write of Certiorari of Willie Andre Smith, Jr.

Three (3) copies of the petition in the above-entitled matter were mailed this date to the Solicitor General, Department of Justice, Washington, D.C. 20530 (the Respondent in this matter) in accordance with Supreme Court Rule 28 (28.3 and 28.4).

Dated: May 11, 1990

/s/ Anthony F. Leonardo, Jr.

ANTHONY F. LEONARDO, JR.
Attorney for Petitioner
Suite 500, 30 West Broad Street
Rochester, New York 14614
(716) 454-7442